Office - Supreme Court, U. S.
FILED
NOV 5 1943
CHARLES ELMORE CROPLEY
CLERK

(23)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 476

UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

CHESTER BOWLES, Acting Price Administrator.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Charles M. Price,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Statement	2
Questions presented	7
Reasons for granting the writ	8

Table of Cases Cited.

Morgan v. *United States*, 298 U. S. 468	13
Panama Refining Co. v. *Ryan*, 293 U. S. 388	13
Schechter Poultry Corp. v. *United States*, 295 U. S. 495	13
Wichita R. R. v. *Public Utilities Commission of Kansas*, 260 U. S. 48	13

Statutes Cited.

Emergency Price Control Act of 1942, (Public Law 421, 77th Cong., approved Jan. 30, 1942):	
Sec. 1(a)	11
Sec. 2(a)	9,12,14,18,20
Sec. 204(d)	2
Judicial Code, Sec. 240, as amended (U. S. C., 1934 ed. Title 28, Sec. 347)	2

Regulations Cited.

General Maximum Price Regulation, April 28, 1942, 7 Federal Reporter 3153	1,4
Maximum Price Regulation No. 188, July 29, 1942, 7 Federal Reporter 5871	1,4,5

Other Authorities Cited.

87 Cong. Rec. 9096	15
87 Cong. Rec. 9121	15

Page

87 Cong. Rec. 9305 15
87 Cong. Rec. 9318 15
88 Cong. Rec. 69 16
88 Cong. Rec. 88 12
House Hearings, 102, 833–848, 852–855, 862–865, 867–874, 1117 15
Pike & Fisher OPA Service, Volume 1, page 11:979, 11:981 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 476

UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

CHESTER BOWLES, ACTING PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, United States Gypsum Company, respectfully prays a writ of certiorari to review the judgment and decree of the United States Emergency Court of Appeals dismissing petitioner's complaint praying that General Maximum Price Regulation,[1] issued by the Price Administrator April 28, 1942, and Maximum Price Regulation No. 188,[2] issued by the Price Administrator on July 29, 1942, be enjoined in so far as they require petitioner to bear its customers' increased cost of transportation and reduce

---

[1] 7 Federal Reporter 3153

[2] 7 Federal Reporter 5871

its f. o. b. plant prices, when selling to customers who formerly purchased from a plant closer to their destinations but which has been forced to close because of the war.

Opinions Below.

The Price Administrator's decision denying petitioner's protest is not officially reported, but is found at pages 64 to 73 of the record. The opinion of the Court below is not yet in the official reports, but appears in the record, pages 123 to 129.

Jurisdiction.

The judgment of the Emergency Court of Appeals was entered August 19, 1943 and the petition for rehearing was denied October 6, 1943. Jurisdiction is invoked under Section 204 (d) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong., approved Jan. 30, 1942).[3] Jurisdiction is also invoked under Section 240 of the Judicial Code, as amended (U. S. C., 1934 ed., Title 28, Sec. 347).

Statement.

Petitioner manufactures gypsum products, such as wall plasters, wallboards, laths and sheathing boards, at various plants throughout the country. These products are sold to building material dealers, who in turn sell them to contractors for incorporation into buildings and structures (R. 34).

Petitioner's gypsum plants are usually located where the basic raw material—crude gypsum rock, is found in com-

[3] Sec. 204 (d) of the Emergency Price Control Act of 1942 provides: "Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U.S.C., 1934 edition, title 28, sec. 347)."

mercial quantities. However, there are no commercial deposits of crude gypsum rock on the Eastern seacoast (the nearest commercial deposits are in Western New York and Western Virginia), and these plants are supplied with crude gypsum rock from deposits in Nova Scotia by water transportation. It is uneconomic to supply east coast plants with crude gypsum rock from inland deposits (R. 35, 36).

One of petitioner's plants is located at Philadelphia, Pa. This plant is dependent upon receiving its supply of crude gypsum rock from Nova Scotia, and was forced to close in July, 1942 because it had run out of crude gypsum rock (R. 35, 40). For many years petitioner owned and operated four vessels for carrying gypsum rock from Nova Scotia to its East coast plants, including the Philadelphia plant, but by the summer of 1942 all of its vessels had been requisitioned by the Government for other war uses and no other shipping facilities were available (R. 40, 45, 46).

Since July, 1942, customers formerly purchasing the products of the Philadelphia plant have had to be supplied from petitioner's New Brighton, Staten Island plant, its plant at Oakfield in Western New York, near Buffalo, and its plant at Plasterco, Virginia, near Saltville. These are the plants closest to the customers who bought from the Philadelphia plant when it was operating. The New Brighton plant, being on the eastern seacoast, is also dependent upon water transportation and has left a very limited supply of gypsum rock. The Oakfield and Plasterco plants are inland and get their rock supply from mines located at the site of the plants (R. 40, 41).

It is the prices of gypsum products at the New Brighton, Oakfield and Plasterco plants when sold to customers formerly purchasing from the Philadelphia plant, that are the source of this controversy.

Petitioner sells the products of these plants at f. o. b. plant prices, and the customer pays and bears the freight

incident to the shipment, no matter what the destination of the shipment may be. On this basis, the products are offered to any acceptable purchaser, no matter what his location or how far he may transport the products. Freight is not a part of the price (R. 38, 39).

Petitioner's f. o. b. plant prices at these plants have been decreasing for a number of years (long before the Act was passed). There have been no increases since 1936 in the f. o. b. plant prices of any of its products at these plants except an increase in the f. o. b. plant price of gypsum plaster at the New Brighton and Philadelphia plants early in 1942, which was first reviewed with the Price Administrator and no objection was made to the increase. Petitioner has not contemplated or asked, and does not now contemplate or ask any increase in its f. o. b. plant prices (R. 39, 40).

Although the Emergency Price Control Act became effective in January, 1942, the prices of the products of these plants were not under price control until April 28, 1942, when the Administrator issued General Maximum Price Regulation, which froze prices of all commodities not theretofore covered by a specific regulation at the highest price charged by each plant during March, 1942 [4] (R. 74-88).

On July 29, 1942, the Price Administrator issued Maximum Price Regulation No. 188, which superseded General

---

[4] General Maximum Price Regulation, as amended, provides in part:

"Sec. 2. Maximum Prices for Commodities and Services. General Provisions. Except as otherwise provided in this regulation, the seller's maximum price for any commodity or service shall be:

(a) the highest price charged by the seller during March, 1942:

(1) for the same commodity or service:

* * * * * * *

For the purpose of this General Maximum Price Regulation, the highest price charged by a seller during March, 1942 shall be:

(a) the highest price which the seller charged for a commodity delivered or service supplied by him during March, 1942 to a purchaser of the same class."

Maximum Price Regulation with respect to sales by manufacturers of a large number of commodities, including the gypsum products involved here. However, this regulation, like General Maximum Price Regulation, established maximum prices at the highest prices charged by the individual seller during March, 1942,[5] and various sections of General Maximum Price Regulation became applicable to Regulation No. 188 by reference (R. 106-117).

Upon the closing of the Philadelphia plant in July, 1942, petitioner followed its customary practice in pricing and announced to its customers that its products could be obtained from its other plants at New Brighton, Oakfield and Plasterco at the f.o.b. plant prices at the plant of shipment. This meant that many customers formerly purchasing from the Philadelphia plant would have to pay more freight to the railroads because the freight rate to such customers from these plants is higher than it was from the Philadelphia plant when that plant was operating. Customers formerly purchasing from the Philadelphia plant recognized this method of pricing to be consistent with petitioner's previous method of pricing and expected to pay and bear additional freight from plants farther away from their places of business. Before the Philadelphia plant was built in 1929 customers in that area purchased the products of

---

[5] The pertinent provisions of Maximum Price Regulation No. 188 are as follows:

"Sec. 1499.153. Maximum Prices for Articles of Building Materials and Consumers Goods finally priced before August 1, 1942.

(a) Articles priced in March, 1942. The maximum price for any article which was delivered or offered for delivery in March, 1942 by the manufacturer shall be the highest price charged by the manufacturer during March, 1942 (as defined in Article 1499.163. * * *

Sec. 1499.163. Definitions.

* * * * * * *

(2) "The highest price charged during March, 1942" means (i) the highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942."

the New Brighton, Oakfield and Plasterco plants at the f.o.b. plant prices at those plants and paid the railroads the full freight to destination. The closing of the Philadelphia plant in July, 1942 recreated the same situation that existed prior to the building of the Philadelphia plant (R. 40, 41).

Although the applicable regulations seemed clearly to permit continuance of this method of pricing, petitioner submitted to the Price Administrator its price announcements and received verbal assurance that the proposed pricing policy was permitted by the regulations, and on July 20th received a letter from the Assistant General Counsel of the Price Administrator to the same effect. A similar letter was also received by counsel for the petitioner from the State Price Administrator of Pennsylvania. And from July 18, 1942 to September 1, 1942, petitioner offered its products on this basis, except where it had commitments previously made or where necessary to meet competition (R. 41, 42).

On September 1, 1942, the Price Administrator notified petitioner that these regulations prohibited petitioner from charging its f.o.b. plant prices for the products of its New Brighton, Oakfield and Plasterco plants when selling to customers formerly purchasing from the closed Philadelphia plant. He ruled that, in making such sales these regulations required that the petitioner charge an f.o.b. plant price which would reflect to such customers the same total cost of product and freight such customers had during March, 1942 in purchasing the products of the Philadelphia plant. In business language the ruling required petitioner, when selling f.o.b. New Brighton, Oakfield and Plasterco plants, to absorb the customers' increased cost of transportation, even though transportation is not a part of the price (R. 42).

The practical effect is that the regulation permits the Oakfield plant to sell its products at its full f.o.b. plant

prices as it did during March, 1942, except when those sales go to destinations formerly supplied by the Philadelphia plant, and then the plant price must be reduced inversely to the distance of the shipment. The Philadelphia plant sold in Eastern Pennsylvania, Southern New Jersey, Delaware, Maryland and the District of Columbia. Under these regulations as so construed, the Oakfield plant may charge its full f.o.b. plant price in Western Pennsylvania, but when it sells in Eastern Pennsylvania must start reducing its prices by the difference in freight from the closed Philadelphia plant and the Oakfield plant to destination, and the closer to Philadelphia the shipment goes, the greater the difference in freight and the lower the price (R. 43).

(All of the facts in this case are contained in the affidavits and statements at pages 34 to 62 of the record.)

Questions Presented.

1) Where plants are forced to shut down and purchasers must seek their supplies from more distant plants at higher freight rates, is there a price-inflation problem and is the Administrator permitted by the Act to require the sellers at the more distant plants to absorb the purchasers' increased freight expense?

2) Where prices of a commodity are not abnormal, excessive or inflationary—where they have been decreasing since 1936—can the Administrator under the standards and purposes of the Act require reduction in those prices which stand at normal levels?

3) Does the Act permit the Administrator to issue regulations which "freeze" the prices of each individual seller at the highest price charged by such seller during a given base period? And, if such regulations are proper under the Act, then is it of any consequence that prices charged by competitors during the base period may be higher or

lower—must not the standards of the Act with respect to the level of prices which the Administrator can fix be applied to the prices of each individual seller, regardless of the prices charged by competitors?

4) The Act requires that any regulations issued by the Administrator must have general applicability and effect. Do these regulations cease to have general applicability and effect if generally sellers at f.o.b. plant prices may charge their highest f.o.b. plant prices during March, 1942, but petitioner is required to reduce its f.o.b. plant prices when selling to customers who were formerly purchasing from the Philadelphia plant?

5) Inasmuch as Section 2 (h) of the Act forbids the Administrator to change established business practices, are these regulations valid in requiring petitioner to reduce f.o.b. plant prices contrary to its normal practice and contrary to the normal practice in the gypsum industry?

Reasons for Granting the Writ.

The war is constantly changing the ability of companies to continue to manufacture particular products at the same plants at which they were manufactured prior to the war. The manufacture of various products at particular locations is constantly shifting and will continue so long as the war effort necessitates the restriction of transportation facilities, the shifting of manpower, and the limitation of the use of certain raw materials to the manufacture of certain products to the exclusion of others. The factual situation in this case is not an unusual or special one. All east coast gypsum plants will eventually close because of lack of shipping facilities and gypsum rock. Petitioner's New Brighton plant has a very limited supply of gypsum rock and will eventually be forced to shut down. The same is true at its Boston and Jacksonville plants. A competitive plant at Portsmouth, New Hampshire has already

shut down because there is no water transportation available and it has to rely on gypsum rock from Nova Scotia.

It is common knowledge that in other industries, plants have closed and the manufacture of many products has been discontinued at some plants because of lack of raw materials, lack of manpower or other war conditions, making it necessary for purchasers to seek their supplies at more distant plants, involving longer freight hauls.

The fact that many buyers have to seek their products from different plants and that in many cases they have to pay more freight, is not a circumstance which gives rise to any inflation problem. Nothing has been inflated—no prices have become abnormal, excessive or inflationary. The price of the product is not increased—in this case petitioner is not asking any more for its gypsum products than it has charged in the past and is now charging thousands of customers. The railroads are getting no more freight than they get under their published tariffs for a haul of that distance. Therefore there is no real inflation problem so far as petitioner's prices are concerned nor the prices charged by the railroad for the freight haul. The only legitimate interest the Administrator has in this situation is the possibility that the additional freight which purchasers have to pay the railroads because they have to buy from more distant plants may have to be taken into consideration in fixing their maximum prices—in this case some building material dealers have increased costs which the Administrator under Section 2 (a) of the Act has the right and duty to take into consideration in fixing maximum prices for those building material dealers.

The Emergency Court of Appeals failed to consider and pass upon the real points of the case. This was due, at least in part, to two fundamental misconceptions. The Court considered that there had been no reduction in petitioner's prices but merely a reduction in income, even though the prices are clearly f.o.b. plant prices and freight

is not a part of the price nor a part of petitioner's cost (R. 126). It also misconceived the nature of the regulations involved, failing to recognize that they are "freeze" regulations which fix maximum prices of each seller at his own maximum price during the base period, and that the prices and practices of competitors are immaterial in determining a seller's maximum prices (R. 126). Starting with these fundamental misconceptions of the situation, the Court concluded the regulations were proper—that there was no reduction in petitioner's prices and that in any event some of petitioner's competitors had during the base period made some shipments in the Philadelphia area and equalized freight with petitioner's Philadelphia plant, and that petitioner had not shown any hardship (R. 126, 127). The Court therefore found it was not called upon to determine whether or not the normal and non-inflationary prices of a company can be reduced by the Administrator and whether or not the proper application of the standards of the Act permit the Administrator to require sellers to absorb the increased costs of their customers (R. 125). If the Court had fully understood that petitioner's prices were actually being reduced below normal and non-inflationary levels and that freight was not a part of petitioner's costs, and had properly conceived the true nature of these "freeze" regulations, it could not have arrived at any such conclusions. The decision is entirely erroneous and has and will continue to create confusion among buyers and sellers of commodities the maximum prices of which are controlled by regulations of the Administrator.

As to the first question, whether or not this situation creates any problem of price inflation and particularly whether or not the Administrator may require one or more sellers to absorb the increased costs or expenses of their purchasers, the Act is an anti-price-inflation act, its purposes being to prevent the prices of commodities from

becoming or remaining abnormal, excessive or inflationary.[6] Petitioner's prices are f. o. b. plant (R. 38, 39). They do not include freight—nor is freight any part of petitioner's costs. All that has happened here is that customers are no longer able to buy from the Philadelphia plant and have to secure their supplies from plants involving a longer freight haul and a larger freight bill. At this point no prices have become abnormal, excessive or inflationary. Petitioner's prices remain unchanged—and those customers who formerly purchased the products of the Philadelphia plant were asked no more for the products of the New Brighton, Oakfield and Plasterco plants than the prices charged to other customers at those plants (R. 39). There is no price inflation involved in this situation.

The Act never contemplated that an increased cost of one commodity (freight, in this case) would have to be borne by the seller of another commodity. The Act directs the Administrator how to handle such situations. Section

---

[6] The purposes of the Act are set forth in Section 1 (a) of the Act as follows:

"To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;

To eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;

To assure that defense appropriations are not dissipated by excessive profits;

To protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;

To prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices;

To assist in securing adequate production of commodities and facilities;

To prevent a post emergency collapse of values;

To stabilize agricultural prices in the manner provided in section 3."

2 (a) of the Act directs the Administrator in fixing maximum prices to give due consideration to the prices prevailing between October 1 and October 15, 1941, or, if those prices were not representative, then the prices during the next nearest two-week priod during which they were representative. This section then says:

> "And shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution and *transportation*, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941." (Italics supplied.)

Increases in cost of transportation are one of those factors of general applicability which the Administrator is specifically directed to consider in fixing maximum prices. The Administrator should have determined whether or not the increases in cost of transportation to the building material dealers in the Philadelphia area were such as to warrant a readjustment of the dealers' prices. Congress contemplated that the maximum prices of some commodities would have to be increased as costs increased.[7]

Instead of giving the situation this consideration and determining to what extent, if any, the building material dealers were entitled to relief because of the circumstance that they had to pay more freight to the railroads than when they purchased from the Philadelphia plant, he determined to reduce the price of the manufacturers by the amount of the increased freight. Obviously this was an easy way

---

[7] See 88 Cong. Rec., page 88 (Senator Brown:)
"The bill requires the Administrator to adjust the prices upward for increased costs of production. As retailers generally replace goods on their shelves, their costs will increase. The bill directs the Administrator to take account of these increased costs in any ceilings he may have established."

out for the Administrator—he had then only to deal with a few manufacturers instead of hundreds of retail lumber dealers—but an entirely incorrect solution under the provisions of the Act.

Nothing in the Act contemplated that the increased costs of one group of sellers should be saddled upon their suppliers and thus reduce the prices of the suppliers. Such a procedure is thoroughly inconsistent with the purposes of the Act and with the duties and rights of the Administrator in the consideration of increased costs. The Emergency Court of Appeals thought it unnecessary to specifically pass on this question because it arrived at the erroneous conclusion that the increases in freight were increases in petitioner's costs and left the prices untouched (R. 126). The Court then went on to hold that there was no evidence that petitioner could not absorb the additional freight cost and therefore the action of the Administrator was proper (R. 127). The Court's failure to consider and pass upon the real question involved leaves the state of the law in entire confusion.

As to the second point, whether or not the standards and purposes of the Act permit the Administrator to reduce petitioner's f.o.b. plant prices, it must be conceded that the purposes and objectives of the Act are to prevent inflation of prices and that the Act contains very definite and specific standards and limitations to be applied by the Administrator in fixing maximum prices. These standards are necessary to the validity of the Act. (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495 (1935)). Failure of the Administrator to observe and apply the standards and directions fixed by Congress renders his regulations and orders invalid. (*Morgan* v. *U. S.*, 298 U. S. 468 (1936); *Wichita R. R.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48 (1922)).

These standards and limitations are found in Section 2 (a) of the Act, which provides:

> "Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or, if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941." (Underscoring supplied.)

It is clear under this section that the Price Administrator has no power to fix prices at any time or in fact at any level. His power to fix maximum prices is limited to commodities that have "risen or threatened to rise in a manner inconsistent with the purposes of the Act." The purposes

of the Act being to prevent abnormal, excessive and inflationary prices, prices of a commodity must have become or threatened to become abnormal, excessive or inflationary before the Administrator can fix maximum prices. If prices have not become abnormal, excessive or inflationary, the most he can claim the right to do is to freeze them so that they cannot become abnormal, excessive or inflationary. Clearly he would have no right to reduce prices that stand at normal levels, unaffected by the war economy, because those prices are already consistent with the purposes of the Act. This Act provides for selective price control—not overall price control—limited to those commodities the prices of which have become or threatened to become inflationary.[8]

And Congress did not leave open to speculation the question what level of prices are to be considered abnormal, excessive or inflationary. It provided that prices prevailing between October 1 to October 15, 1941 shall be considered at normal levels unless the prevailing prices between those dates are not representative. Congress deliberately

---

[8] 87 Cong. Rec. 9096 (Rep. Clyde Williams, of Missouri, a member of the House Committee on Banking and Currency):

> "The committee bill before the House is a selective price control bill. It is a bill which permits the Administrator, when any of these prices get out of line, when they rise above or far above the normal level, to take charge of them and hold them in line, not to permit them to go up to the sky. That is the difference between the two plans. If these commodities that are now below the level rise to a point where they get out of line, then will be the time for the Administrator to take charge of them and keep them and hold them in line."

See also statements of Leon Henderson before the House Committee on Banking and Currency (House Hearings, 102, 833-848, 852-855, 862-865, 867-874, 1117); Rep. Thomas Rolph, of California, a member of the House Committee on Banking and Currency, at 87 Cong. Rec. 9121; Rep. Steagall, of Alabama, Chairman of the House Committee on Banking and Currency, at 87 Cong Rec. 9305; and Rep. Albert Gore, of Tennessee, at 87 Cong. Rec. 9318.

placed this standard in the Act as a limitation on the Administrator.[9]

Petitioner's prices are f. o. b. its plants—freight is not a part of the prices (R. 38). They have been decreasing since 1936 (with the exception of an increase in plaster prices which is not significant here) (R. 39). Petitioner is not asking for any more money for its products (R. 39). Nevertheless, the Price Administrator says that the applicable regulations mean that petitioner must reduce its f.o.b. plant prices at its New Brighton, Oakfield and Plasterco plants when shipping to customers formerly purchasing from the Philadelphia plant, by the amount of the increased freight the customers have to pay the railroads (R. 42). In this respect the regulations violate this standard.

The Emergency Court of Appeals gave no consideration to the standard of the Act which definitely fixed the level of prices considered to be normal as the prices prevailing between October 1 to October 15, 1941. It merely concluded that the Administrator's regulations, as interpreted by him, did not reduce prices below normal levels—a conclusion which is clearly erroneous on any reading of the record.

The Court then concluded that the reduction in income does not offend the provisions of the Act because there was no showing of any hardship (R. 126, 127). The Court should have considered the standard of the Act fixing the normal

---

[9] 88 Cong. Rec., page 69 (Senator Brown):

"It would establish as a base date prices for commodities as of the period from October 1, to October 15, 1941. Let me repeat that in a slightly different way, because it is one of the fundamental things in the bill. It is the standard that is laid down, and one of the principal guides to the limitations upon the Price Administrator. In general, the bill would endeavor to hold the general level of prices to the level which existed during the period from October 1 to October 15, 1941. • • • The bill, if enacted into law, would leave untouched and unregulated prices within the jurisdiction of the Price Administrator if they remain at or below the level of prices during the period from October 1 to October 15, 1941."

prices at the level which existed October 1 to October 15, 1941 and determined whether or not the standards of the Act permitted the reduction of petitioner's prices below that level. This decision should not be permitted to stand—there must be a determination of the question whether the standards of the Act permit a reduction of prices which stand at normal levels.

Point No. 3 raises the question whether or not the Act permits the Administrator to issue "freeze" regulations such as General Maximum Price Regulation and Maximum Price Regulation No. 188, which do not establish overall industry prices for a commodity but establish a maximum price for each individual seller dependent upon the highest price charged by that seller during the base period. This point also raises the further question that, if such regulations are permitted under the Act, then is it not proper to apply the standards of the Act separately to the prices of each seller? Is it of any consequence at what prices and according to what practices competitors sold during the base period?

Under the Act the Administrator has issued two distinct types of maximum price regulations. One fixes overall industry dollar-and-cents maximum prices. The other, which is typified by General Maximum Price Regulation, establishes a maximum price for each seller based on the highest price the particular seller sold the product during March, 1942. Under "freeze" regulations the seller's maximum prices are established for each separate seller regardless of the prices charged by his competitors during the same period.

It is questionable whether or not a "freeze" regulation was ever contemplated by the Act, because during any base period it is inevitable that some sellers will have different prices than their competitors for the same products, and thus be in more favored or disadvantageous positions, which certainly cannot be said to be "generally fair and

equitable''. The debates in Congress and the hearings before Congressional committees are not enlightening on this question, but the very wording of Section 2 (a) of the Act would seem to forbid any type of regulation which would result in one seller having a lower or higher maximum price than his immediate competitor.

But, if these ''freeze'' regulations are valid, then it is also true that the standards to be observed by the Administrator in fixing such prices must be applied to each individual seller rather than the industry as a whole. Whether or not the maximum price fixed is ''generaly fair and equitable'', whether or not the prices are above the normal level of October 1 to October 15, 1941, whether or not the prices during that period are representative, whether or not there are other factors of general applicability to be taken into consideration—all these standards and limitations must be applied to the separate sellers—not the industry as a whole. Under the individual seller ''freeze'' regulations, the prices and practices of competitors have no bearing in determining whether or not the Administrator observed the standards of the Act in fixing the maximum prices for a particular seller.

The Emergency Court of Appeals concluded that these regulations, as so interpreted, were proper because some of petitioner's competitors had reduced their f.o.b. plant prices during March, 1942 because they were selling in competition with petitioner's Philadelphia plant and had to equalize freight (R. 126). The Court concluded that, inasmuch as some of petitioner's competitors had so reduced their prices (the record does not disclose how many sales they made or of what products) it was fair and equitable to require petitioner to do so (R. 126, 127). In other words, the Court thoroughly confused the principle of a ''freeze'' regulation with that of an overall dollar-and-cents industry price. The

decision of the Emergency Court of Appeals should not be permitted to stand.

Presumably the Administrator could have issued overall industry maximum prices applying to all sellers shipping gypsum products to customers who were formerly supplied by the Philadelphia plant. But he did not undertake to do so. And, if he had done so, then whether or not the maximum prices so established by him as overall industry prices would be "generally fair and equitable", would involve consideration of many factors and circumstances bearing on the question of fair and equitable prices for the industry as a whole, but which are not material in a case involving an individual "freeze" regulation. It is undoubtedly true as the Emergency Court of Appeals says, that if the overall industry prices fixed are "generally fair and equitable", it is of no consequence that the prices of some manufacturers are reduced (R. 126). But, as stated, that involves a consideration of many factors not even in the record. It would then be necessary to determine to what extent and how often and with what products competitors had entered the area normally supplied by petitioner's Philadelphia plant and in doing so reduced their prices by equalizing freight. Only by an examination of these factors could it be determined whether an overall industry price would be generally fair and equitable to all members of the industry. A few such sales at reduced prices by some competitors could hardly be said to warrant reducing the f.o.b. plant prices of all competitors. The record does not contain any adequate evidence with regard to these matters, so that the Emergency Court of Appeals had nothing on which to find that, even if the Administrator was establishing the overall industry prices (which he obviously was not doing) the prices established were generally fair and equitable.

Point No. 4 questions whether or not the "freeze" regulations applicable to these products have the general applicability and effect required by Section 2 (a) of the Act when sellers at f.o.b. plant prices may charge their full f.o.b. plant prices and require the customer to pay the full freight to destination, but require petitioner to reduce its f.o.b. plant prices when selling to customers formerly supplied by the closed Philadelphia plant.

Section 2 (a) of the Act provides in part:

> "As used in the foregoing provision of this subsection the term 'regulation or order' means a regulation or order of general applicability and effect."

The Administrator has recognized in all of his rulings that prices f.o.b. plant do not include freight and that, in making such prices, the customer may be required to pay the freight incident to the shipment except when, during the base period, he had a practice of reducing his f. o. b. plant price by absorbing freight against a competitive plant, and then he must continue to do so to the same extent that he did during the base period. The Administrator has admitted that petitioner's prices are prices f.o.b. plant and that they do not include freight. The Administrator has also, by various rulings, recognized that, under f.o.b. plant pricing, any increases in freight shall be borne by the purchaser. And other rulings and interpretations recognize that, under f.o.b. plant pricing, if one plant closes and purchasers are required to purchase from more distant plants, they may be required to pay the increased freight.[10]

---

[10] See Pike & Fisher OPA Service, Volume 1, page 11:979:

"If the seller sold f.o.b. in March, increases in outbound transportation can of course be passed on to the purchaser."

Page 11:981:

"A buyer located on the West Coast has customarily purchased merchandise f.o.b. West Coast warehouses. Many of the selling companies have closed their West Coast warehouses, thus requiring the buyer

Nevertheless, his regulations, as interpreted by his ruling of September 1, 1942, specifically require petitioner to reduce its f.o.b. plant prices at certain plants by the difference in the amount of freight which the customer had to pay the carrier from the Philadelphia plant and what he now has to pay the carrier from more distant plants. The interpretation which he makes of his "freeze" regulations in this case is not extended by him to apply generally to all sellers, either in the gypsum industry or any other industry and in all other cases sellers are free to require their customers to pay their full f. o. b. plant prices and to require them to pay the freight to destination.

The Emergency Court of Appeals disposed of this question by saying that the regulations or orders of the Administrator need not have the same effect on the business of all in an industry and that different effects will result in the affairs of different concerns (R. 127). But this does not

---

to purchase merchandise from the same sellers at f.o.b. eastern points and pay the additional transportation charges to the West Coast. * * * If the closed West Coast warehouse was a separate selling unit of the particular company, then the buyer may be required to absorb the increased transportation charges, since each separate selling unit determines its own separate ceiling prices without reference to the others and the eastern selling unit had established maximum f.o.b. prices."

A letter of June 24, 1942 from Assistant General Counsel of OPA to counsel for petitioner says in part:

"Your plant has discontinued production of certain items of plaster at its Florida mill because the rock necessary for the production of such plaster is no longer available in Florida. You inquire whether a Florida purchaser ordering such plaster may be required to pay the Virginia mill price plus freight charges to Florida. You represent that this is the customary method of pricing at the Virginia mill. Inasmuch as such customer in taking delivery from Virginia is purchasing from a different seller, he may be charged the highest price in effect during March, 1942 for sales from the Virginia mill to purchasers of the same class. In other words, only if the Virginia mill sold to that class of purchasers which includes Florida purchasers during March, 1942 at the Virginia mill prices plus freight charges may they do so now."

answer the plain question whether or not these regulations, as construed by the Administrator, are, in fact, of general applicability and effect. It is apparent that they are not of general applicability and effect for the reasons stated above.

With regard to Question No. 5—whether or not the regulations, as thus interpreted, operate to compel changes in business practices established in any industry—the record is uncontradicted that it has never been the practice of petitioner or anyone in the gypsum industry to reduce f. o. b. plant prices except in cases of economic necessity, such as freight equalization against a competitive plant (R. 38). It has never been a practice of this petitioner or of anyone in the industry to equalize freight against its own plants (R. 37, 38). To argue to the contrary would be to argue an economic fallacy. Under the business practices of petitioner and others in the industry, when a plant is closed and the customers in that area are supplied by other plants, the practice has been to require the payment by the customer of the full freight. The regulations, as interpreted by the Administrator, require that petitioner equalize freight against its closed Philadelphia plant—a practice which neither petitioner nor anyone in the industry would have under similar circumstances, because there is no economic force compelling a reduction in the f. o. b. plant price by equalizing freight.

As to this question, the Emergency Court of Appeals concluded that the Administrator had not undertaken to invade or revamp business practices or methods in the gypsum industry and that, if in bringing about firm fixation of prices, such result ensued, it was necessary to prevent a circumvention of the regulations (R. 129). In other words, the Court concludes that, if petitioner was permitted to charge its f. o. b. plant prices, it would be circumventing

the regulations, although the regulations in the plainest language fix the maximum prices of any seller at the highest prices charged during March, 1942 and, if it were not for the special interpretation of the Administrator on September 1, 1942 with reference to the particular situation involved in this case, petitioner could have continued to charge its full f. o. b. prices at its New Brighton, Oakfield and Plasterco plants. The decision of the Emergency Court of Appeals, if permitted to stand, would effectively nullify Section 2 (h) of the Act.

Petitioner respectfully submits that this petition for writ of certiorari should be granted for the reasons stated.

Respectfully submitted,

CHARLES M. PRICE,
Attorney for United States Gypsum Company.

(9051)